Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John E. Thomas
Attorney for Petitioner
360 Wabasha Street
St. Paul, MN 55102
612/298-1950

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IN THE

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KATHLEEN R. REITER,

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SONOTONE CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, a consumer, petitions this Court to issue a Writ of Certiorari to review the decision of a two judge panel[1] of the Eighth Circuit filed on June 19, 1978, denying standing to consumers of the United States under Section 4 of the Clayton Act. A Petition for Rehearing En Banc was denied on August 11, 1978, by a 4-3 split in the Court.

OPINIONS BELOW

The Statement by the three judges favoring a rehearing *en banc* is reported in 1978-1 Trade Cases para. 62,183, —— F.2d ——. The opinion by the two-judge panel is reported in 1978-1 Trade Cases para. 62,098, —— F.2d ——. The opinion by the Honorable Earl R. Larson, of the District of Minnesota, is reported in 435 F. Supp. 933.

[1] Judge Webster heard argument but took no part in the decision.

JURISDICTION

On June 28, 1977, the Eighth Circuit, pursuant to 28 U.S.C. Sec. 1292 (b), granted the defendant companies' application for leave to take interlocutory appeal, from which the appeal was perfected. The date of the entry of the judgment of the two judge panel of the Eighth Circuit was June 19, 1978. The plaintiff consumer's Petition for Rehearing En Banc was denied by Order entered August 11, 1978, with three of the seven judges dissenting therefrom. This Petition was filed within ninety days thereafter in accordance with 28 U.S.C., Sec. 1254 (1) for determination and relief as provided in 28 U.S.C., Sec. 2106 or otherwise.

QUESTION PRESENTED

Do not consumers who purchase price-fixed property for personal use suffer injury to their "property" within the meaning of Section 4 of the Clayton Act?

STATUTE INVOLVED

Section 4, Clayton Act. (October 15, 1914, Chap. 323 Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.)

Sec. 4. That *any person* who shall be *injured* in his business *or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee. (emphasis herein).

STATEMENT OF THE CASE

Petitioner cannot improve on the concise statement by the Honorable Earl R. Larson in his Memorandum Order of March 31, 1977, wherein he upheld consumers after describing the case as follows:

> Plaintiff, along with all potential members of the class she seeks to represent, is a purchaser of a hearing aid manufactured by one of the defendants and distributed by methods that allegedly contravene the antitrust laws. She is not in any business related to that of defendants or their distributors and alleges no property interest other than that of an individual who, because of defendants' actions, was forced to part with more money to purchase a hearing aid than she would have had to pay had they not engaged in allegedly illegal business practices. *She is the classic consumer plaintiff.* (emphasis herein) (A. 3)

The basis for federal jurisdiction in the District Court were sections 14 and 16 of the Clayton Act.

ARGUMENT

> "This issue *will undoubtedly be decided by the Supreme Court*, and to the extent that it is possible to divine the result, I conclude that the Court believes that retail consumers do have standing to sue under the Clayton Act . . . .
>
> In short, both the dicta and the presuppositions in the recent Supreme Court opinions suggest that *the Court will hold* that a consumer such as the present plaintiff may sue under the Clayton Act."

The quotation is from the opinion by Judge Nickerson in *Theophil v. Sheller—Globe Corp.* 44 F. Supp. 131, 135 (E.D. N.Y. 1978). He fully expects this Court to decide the question. He lined up with the many other Judges that have cited and followed Judge Larson herein. This case is the first one to present the question to this Court. The question is an important question of federal law which has not been, but should be settled by this Court.

To this date, no Circuit Court, other than the *Eighth* herein, has decided the question. The distinct District Judge that has not followed Judge Larson herein and that is Judge Williams of the Northern District of California in a "trilogy" of opinions cited in the Panel opinion herein. The other Judges that have concluded the same as Judge Larson did herein are listed as follows:

In re Ampicillin Antitrust Litigation
1977-1 Trade Cases Para. 61,434 (D.C. 5/17/77)

De Gregario v. Segal
443 F. Supp. 1257 (E.D. Pa. 1978)

Kaplan v. Rolex
Los Angeles Superior Ct., CA000,467, Minute Order by Judge David Thomas 8/11/78

In re Petroleum Products Antitrust Litigation
1977-2 Trade Cases Para. 61,639 (C.D. Cal. 9/16/77)

Rosack v. Volvo of America Corp.
1977-1 Trade Cases Para. 61,395 (Cal. Superior Ct. 3/16/77)

Theophil v. Sheller-Globe Corp.
446 F. Supp. 131 (E. C. N. Y. 2/23/78).

In a Memorandum Opinion, July 5, 1978, Judge Richey again had the question before him in the *Ampicillin Antitrust Litigation* M.D.L. Dkt. No. 50, Misc. 45-70 (D.C. 7/5/78) and again concluded as follows:

> "The Court concludes, based on *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *In re Petroleum Products Antitrust Litigation* 1977-2 CCH Trade Cas. Para. 61,639 (C.D. Cal. 1977); and *Reiter v. Sonotone*, 435 F. Supp. 933 (D. Minn. 1977), that the prevailing and better view is that these plaintiffs do have standing to seek treble damages under Para. 4 of the Clayton Act."

The commentary by the District of Columbia Circuit Court should be added to the list. *Cleary v. Chalk*, 488 F. 2d 1315, 1319 n. 17 (D.C. Cir. 1973), *cert. den.*, 416 U.S. 938 (1974).

Professor Sullivan has expressed his view that:

> "Analysis suggests that a non-business consumer who has paid a higher price because of an anti-trust violation also has a cause of action under section 4."

He goes on to discuss Mr. Justice Holmes and Congress and concludes:

> "This rationale clearly covers the 'property' of an ultimate consumer as well as that of a business firm. Courts and commentators seem to have accepted this position without much discussion."

The professor then considers that the opinions of this Court in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) support consumer standing. See L. Sullivan, Antitrust 771 n. 3 (1977).

The Panel opinion tries to lay the blame on Mr. Justice Marshall's passing comment in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) where he had said:

> "Like the lower courts that have considered the meaning of the words 'business or property' we conclude that they refer to commercial interests or enterprises."

Anyone familiar with the antitrust decisions of the Supreme Court would find it cruel indeed to rely in particular on a statement by Mr. Justice Marshall to *deny* consumers standing under the antitrust laws. Further on in that opinion he raises a stentorian call-to-arms for classes of private citizens such as the consumer class herein. The opinion proclaimed in conclusion:

> "We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests.
>
> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 USC §1337; 15 USC §15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldy; it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens. Respondents, in moving to dismiss count three of the fourth amended complaint, in which the State sought to bring such an action, virtually conceded that class actions might be appropriate under certain circumstances. The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorneys' fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.
>
> Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries."
> 405 U.S. 265, 266.

The Panel cites the *Pfizer, Inc. v. Government of India*, 54 L.Ed.2d 563 (1978) opinion many times. However, the Panel overlooked the key phrase in the *Pfizer* opinion which, of course, is the one stating that:

> "Clearly therefore, Congress did not intend to make the treble damage remedy *available only to consumers* in our own country". (54 L. Ed. 2d 563, at 570) (emphasis herein).

This Court could not have made itself more clear. Indeed, if one reads the Panel opinion in footnote 12 where *Pfizer* is first cited, one would have to believe that the Panel was bound to affirm Judge Larson, cf *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, Footnote 10 (1977); *Goldfarb v. Virginia State Bar*, 421 U. S. 733, 782, 783, 787, 788 and 792 (1975); *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 264 (1972);

Mandevill Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219, 236 (1948).

The question emanated from the opinion by Judge Henley while still a District Judge, in *Ragar v. T.J. Raney and Sons*, 388 F.Supp. 1184, 1187 (E.D. Ark), aff'd, 521 F.2d 795 (8th Cir. 1975).

See this Petitioner's counsel's letter back on November 5, 1975, to Judges Matthes, Heaney, Stephenson and Henley (reprinted herein Add. p. 2). From that date forward, the Eighth Circuit had the question in mind. The Panel bootstraps itself here. Judge Williams cited and relied on the *Ragar* opinion and the Panel recognizes that reliance (Pan. Op. 12, fn. 11). Now, based upon the fact that Judge Williams "examined" the "language" in *Ragar*, the Panel goes full circle and cites and relies on *Ragar* as "approved" language in the Eighth Circuit. (Pan. Op. 13). This is done with no recognition of the four other judges, each following Judge Larson, who had already examined the language of *Ragar* and did not apprehend it as a bar to consumers.

It is perhaps most confusing that just four days before the Panel opinion herein, Judge Henley wrote the antitrust opinion in *Stifel, Nicolaus & Company v. Dain, Dalman & Quail*, 1978-1 Trade Cases para. 62,094 (8th Cir. 1978). In footnote one in *Stifel*, Judge Henley described section four of the Clayton Act as follows:

> "Section 4 of the Clayton Act of 1914, 15 U.S.C. para. 15, gives to an *individual* who is *injured* as a result of violations of para. 1 or para. 2 of the Sherman Act a *private* cause of action in which, if successful, he may recover treble damages, costs and an attorney's fee."

Supra, at page 74,793 (emphasis herein). Petitioner finds it particularly significant that Judge Henley used the term "individual" rather than the statutory term "person". Consumers are "individuals" whereas corporate businesses are not. It is ironic that Judge Larson sat by designation in *Stifel*. Judge Larson certainly would have expressed objection had Judge Henley apprehended section 4 differently than had Judge Larson herein. The definition in *Stifel* is what this Petitioner anticipated from Judge Henley and it should have dictated the result just four days later herein.

The legislative history of section 4 of the Clayton Act and its predecessor statute has recently been analyzed by this Court in footnote ten of the opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The references therein by this Court clearly favor consumer standing herein.

> 10. Treble damage antitrust actions were first authorized by § 7 of the Sherman Act, 26 Stat 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "[t]he people of the United States as individuals," especially consumers, 21 Cong Rec 1767 (1890) (remarks of Sen. George); see id., at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 3146-3149. Treble damages were provided in part for punitive purposes, id., at 3147 (Sen. George), but also to make the remedy meaningful by counterbalancing "the difficulty of maintaining a private suit against a combination such as is described" in the Act. Id., at 2456 (Sen. Sherman).
>
> When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under §7 of the Sherman Act" to persons injured by virtue of any antitrust violation. HR Rep No. 627, 63d Cong, 2d Sess, 13 (1914). The initial

House debates concerning provisions related to private damage actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 Cong Rec 9073 (1914) (remarks of Rep. Webb); see e.g., id., at 9079 (Rep. Volstead), 9270 (Rep. Carlin); 9414-9417, 9466-9467, 9487-9595. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble damage suits as an important means of enforcing the law. Id., at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions, e. g., id., at 14818-14821 (Sen. Reed), 16042-16046 (Sen. Norris).

At this point, we can trace the statement by Justice Marshall in *Hawaii, supra*, right back to the only court decision squarely on this very question. Justice Marshall cited (405 U.S. at 264) three cases, the second of which is *Hamman v. U.S.*, 267 F.Supp. 420 (D.Mont. 1967) where survivors of accidently killed construction workers were denied loss of consortium because it was held not to be an antitrust-type property interest. In *Hamman* the Court noted 267 F.Supp. at 432, that the plaintiff correctly cited *Waldron v. British Petroleum Co.*, 1964 CCH Trade Cas. p. 71,165 (S.D.N.Y. 6/23/64) for the principle that "property" is a much broader term than "business". The court in *Waldron, supra*, had expressly held:

"The above analysis would be dispositive of this issue if §4 of the Clayton Act protected only a person injured

in his 'business.' However, §4 has a broader sweep. It provides that 'any person who shall be injured in his business *or property* . . . may sue' (Emphasis original.)

The majority of cases cited by defendants do not advert to the distinction between 'business' and 'property" for the simple reason that that distinction was not in issue in those cases, as it is here.

The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.'

The statute does not set up a qualitative or quantitative test to determine the existence of 'property.' Nor does the statute contain a built-in definition.

The word 'property' is, in a sense, a conclusory term, i.e., an interest which the law protects. A determination whether plaintiff has 'property' involves a value judgment as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property.' "

That court held that plaintiffs' contract was "property", although not a "business" because incipient, and afforded standing.

The Seventh Circuit followed *Chattanooga Foundry, supra*, and said in *Congress Building Corp. v. Loew's Inc.*, 246 F.2d 587, 594, that the "business" argument need not be considered since the plaintiff was injured in his property, because, "*A*

man is injured in his property when his property is diminished". (Emphasis herein). *Utah Gas Pipelines Corp. v. Natural Gas Co.*, 233 F.Supp. 955, 964 (D.Utah, 1964).

Finally, on this point, Judge Neville, late of the District of Minnesota, cited and followed the oft-quoted statement of Mr. Justice Holmes. See *Minnesota v. U.S. Steel Corp.*, 299 F.Supp. 596, 604 (D.Mn. 1969) where Judge Neville also noted that:

> "Yet, as a practical matter, a suit by a governmental claimant who is a purchaser not engaged in business for profit is probably limited to the increased costs theory of damages."

In other words, non-business plaintiffs such as consumers herein, measure their damage by the amount of the overcharge.

The Ninth Circuit very recently cited the legislative intent to be the "maximization of consumer welfare" in *Boddicker v. Arizona State Dental Assn.*, 1977-1 CCH Trade Cas. para. 61,258 (9th Cir. 1/6/77) fn. 10 on p. 70,797:

> "In an exclusive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded:
>
> '[T]he legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.' Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Econ. 7, 10 (1966)."

The Congressional Record is replete with references to consumers being given standing. Before Section 4 of the Clayton Act, we had Section 7 of the Sherman Act, the first version

of which was criticized for not being strong enough for *consumers* suing large corporate violators. See remarks by Senators Coke, Hiscock and Teller in 21 *Cong. Rec.* 2615, 2571 and 2572 respectively.

Senator Sherman said the intent of Section 2, the harbinger of Section 7, was to give "private parties a remedy for personal injury" caused by a violation. 21 *Cong. Rec.* 2456. Senator George made it clear that under Section 7, a consumer was thought to be "the party necessarily demnified or injured". 21 *Cong. Rec.* 1767-68.

The redraft of Section 7 strengthened the hand of consumers by providing for *treble* damages and expressed "business or property" injury. 21 *Cong. Rec.* 2901. At the time he presented the redraft to the Senate, Senator Hoar simply stated "I shall not undertake to explain the bill, which is well understood." 21 *Cong. Rec.* 3145.

There simply was no substantive change as defendants attempted to argue below. Senator Morgan had commented that a *personal* remedy was being given to *whoever* may be injured in his business or property. (Emphasis herein.) 21 *Cong. Rec.* 3149.

Significantly, the Senate debate after the redraft of Section 7 concerned possible amendment to then provide for *class* actions by consumers (who obviously then must have had individual standing). 21 *Cong. Rec.* 3147-51. The concerned remarks about practicality of consumer suits noted by defendants (Dr. Br. 17-18) were to strengthen the provision and did *not* concern the question of standing.

Section 4 of the Clayton Act was only a reenactment of Section 7. See 51 *Cong. Rec.* 9164; 14,214; 15,938; 16,319; House Report No. 627 at p. 36; Senate Report No. 698.

This Court said in *Illinois Brick v. State of Illinois*, 431 U.S. 720 (1977) that the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1394-96 (1976):

> ". . . did not alter the definition of which overcharged persons were injured within the meaning of Section 4. It simply created a new procedural device—parens patriae actions by States on behalf of their citizens—to enforce existing rights of recovery under Section 4". (emphasis herein) 431 U.S. at 733 n. 14.

Mr. Justice Rehnquist recently noted "a congressional policy favoring private enforcement of the antitrust laws" and added that "undoubtedly there exists a strong national interest in antitrust enforcement". *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977).

Foreign governments have standing to sue and because of the reasoning of the Panel herein in attempting to rationalize away Mr. Justice Holmes' opinion in *Chattanooga Foundry*, such governments are now guaranteed continued standing while American consumers are to be denied access to the Courts of this nation. Such a result is incredible and this Court should strike it down forcefully on behalf of the people. The Eighth Circuit is split four to three and the Panel should be reversed accordingly.

CONCLUSION

Mr. Justice Holmes could not have made it more clear when he said that:

> "A man is injured in his property when his property is diminished."[2]

Dated: October 6, 1978.

Respectfully submitted,

John E. Thomas
Attorney for Petitioner
360 Wabasha Street
St. Paul, MN 55102
612/298-1950

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[2] *Chattanooga Foundry & P. Works v. Atlanta*, 203 U.S. 390, 396 (1906); Cf. *Congress Building Corp. v. Loew's Inc.*, 246 F. 2d 587, 594 (7th Cir. 1957); *Utah Gas Pipelines, Corp. v. Natural Gas Co.*, 233 F. Supp. 955, 964 (D. Utah 1964).

ADDENDUM

United States Court of Appeals
For The Eighth Circuit
St. Louis, MO 63101

November 10, 1975

Mr. John E. Thomas
Cochrane & Bresnahan
Suite 500 Cochrane & Bresnahan Building
360 Wabasha Street
St. Paul, Minnesota 55102

Re: 75-1175. Ragar & Ferra v. Raney & Sons, et al.

Dear Mr. Thomas:

The enclosures received with your letter of November 5, 1975, have been submitted to the judges mentioned in your letter.

The court has directed me to advise you that the letters have been received and read.

Please be assured that if I receive further directions in this case you will be so advised.

Very truly yours,
ROBERT C. TUCKER
Clerk

November 5, 1975

Honorable M. C. Matthes
Honorable Gerald W. Heaney
Honorable Roy L. Stephenson

Re: Rager v. Raney & Sons, No. 75-1175

Dear Judges:

Because of the per curiam reference of this Court, I read with interest, the trial court opinion by the Chief Judge Henley in 388 Fed. Supp. 1184. I believe Judge Henley's dismissal was founded on two independent grounds. The first was a lack of standing. The second was a lack of competitive injury to a business. Since those plaintiffs were simply property owners, I am afraid such a holding affectively bars all antitrust suits by consumers. I am not aware of any such holding by any other court. Consumers have been held to be too "remote" in certain circumstances. Although this question was not at issue, this Court denied interlocutory appeal of a certified antitrust class of consumer—home buyers in *Greater Minneapolis Area Board of Realtors v. Forbes*, 1973-2 Trade Cases 74,651, at page 94,858.

If deemed fit and appropriate, perhaps this Court's opinion might be amended to affirm only on the lack of standing. (The Ninth Circuit has recently amended two of it's antitrust opinions, 734 A.T.R.R., at A-16 and A-17). Such clarification could avoid the type of situation that had to be cleared up recently by this Court in *Carlson Companies, Inc. v. S & H Co.*, 1974-2 Trade Cases par. 75,428, at page 98,425 (1974).

Aside from my interest in the opinions of this Court as an antitrust practitioner, I must disclose that I presently do represent a plaintiff-consumer in an antitrust class action getting under way in the District of Minnesota before Judge Larson.

However, the question I've presented here has not yet been raised by defendants before Judge Larson.

Respectfully,
COCHRANE & BRESNAHAN
By John E. Thomas

JET: sr
cc: Honorable J. Smith Henley

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-75-Civil 206

KATHLEEN R. REITER, et al,

Plaintiffs,

vs.

SONOTONE CORPORATION, BELTONE ELECTRONIC CORPORATION, DAHLBERG ELECTRONIC, INC., TEXTRON, INC., RADIOEAR CORPORATION,

Defendants.

AMENDED ORDER

The Order of this Court issued March 31, 1977, is hereby amended as follows:

Page 4, first full paragraph, first sentence should read:

> Defendants base much of their argument on the holding in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.) *cert. den.* 414 U.S. 1045 (1973), which dismissed governmental plaintiffs who alleged general economic harm rather than specific injury to the states as consumers. *Multidistrict Vehicle Air Pollution, supra,* at 125.[2]

Page 7, prior to the Order statement, add:

> This Court is of the opinion that its Order involves a con-

trolling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of litigation.

Page 7, add to Order statement:

That all further proceedings in this matter, including discovery, shall be stayed, pending the disposition by the Court of Appeals of defendants' appeal from this Order.

EARL R. LARSON
United States District Judge

May 10, 1977.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-75-Civ. 206

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Plaintiffs,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS INC., a Minnesota corporation; TEXTRON INCORPORATED, a Delaware corporation, and RADIOEAR CORPORATION, a Delaware corporation,

Defendants.

MEMORANDUM ORDER

Plaintiff Kathleen R. Reiter brings this antitrust action seeking damages and injunctive relief against five manufacturers of hearing aids. In her complaint she requests certification of a class consisting of all persons who have purchased hearing aids manufactured by any of the defendants. All defendants except Sonotone, which has not appeared in any proceeding in this case, move for dismissal or, in the alternative, for summary judgment.

Plaintiff, along with all potential members of the class she seeks to represent, is a purchaser of a hearing aid manufactured by one of the defendants and distributed by methods that allegedly contravene the antitrust laws. She is not in any business related to that of defendants or their distributors and alleges no property interest other than that of an individual who, because of defendants' actions, was forced to part with more money to purchase a hearing aid than she would have had to pay had they not engaged in allegedly illegal business practices. She is the classic consumer plaintiff.

Defendants base their motion solely on the ground that plaintiff and the members of any class she would represent lack standing to sue for damages under § 4 of the Clayton Act, 15 U.S.C. § 15. In support of their arguments defendants have cited an impressive array of cases dealing with the standing issue. They concede, however, that apart from a very recent set of opinions issued by Honorable Spencer Williams, United States District Judge for the Northern District of California,[1]

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[1] *Morgan v. Federated Dept. Stores, et al*, Civ No. 76-1429 SW; *Weinberg v. Federated Dept. Stores, et al*, Civ No. 76-367 SW; *Smith, et al v Toyota Motor Sales USA, Inc., et al*, No. C-75-0727 SW; *Gutierrez, et al v. E. & J. Gallo Winery Co., Inc., et al*, No. C-75-0001 SW (Jan. 11, 1977). In three identical opinions, Judge Williams dismissed the cases for lack of standing on the part of plaintiff consumers. In a letter to counsel for plaintiffs in these cases, dated March 16, 1977, he has denied rehearing.

there exists no case law precisely on point. To date, a number of large consumer class actions have been prosecuted, many to conclusion, without any consideration of the standing issue raised here. This case therefore is one of first impression in this district and, if only published precedent is considered, nationally.

A. *The "Target Area" Test.*

Development of standing doctrine under § 4 of the Clayton Act has been shaped by judicial awareness of a need to limit the statute's seemingly broad grant of rights to sue: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . ." As the Second Circuit has remarked, a literal interpretation of these words would open the "floodgates to all, no matter how remote their interest or incidental their relationship;" given the imprecision of substantive antitrust statutes and doctrine, such limitation of standing is necessary to keep the caseload and the fact situations of the cases within manageable bounds. *Calderone Enterprises Corporation v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 at 1295-96 (2d Cir. 1971), *cert. den.* 406 U.S. 930 (1972). Therefore, in analyzing a plaintiff's relationship to defendants and to the alleged facts, the Court must ask whether plaintiff is a person within the "target area" of the alleged antitrust conspiracy. *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 at 689 (8th Cir. 1966) (explicitly endorsing application of the "target area" test as explained in *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 at 362 (9th Cir. 1955)).

The target area test is essentially a measure of remoteness of injury resulting from antitrust violations. In most cases it

serves to eliminate those plantiffs whose business relationship with defendants is so attenuated as to render the alleged injury negligible or highly speculative. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 310 (S.D. N.Y.1971) (farmers whose purchase of poultry feed was several levels removed from the actions of drug manufacturers, so that damage could not possibly be established, lacked standing); *Nassau County Association of Insurance Agents, Inc. v. Aetna Life and Casualty Co.*, 361 F. Supp. 967 (S.D. N.Y. 1973), *aff'd* 497 F.2d 1151 (2d Cir.), cert den 419 U.S. 968 (1974) (injury to association of insurance agents too remote where actions of company directed at the agents); *Calderone Enterprises Corp., supra,* (theatre landlord whose lessee's revenue, upon which the rental was partially based, were adversely affected by defendants' business methods, too remote); *State of Illinois v. Ampress Brick Co., Inc.*, 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd in part* 536 F.2d 1163 (7th Cir. 1976), *cert. granted* 45 U.S.L.W. 3340 (Nov. 8, 1976) an "ultimate" consumer or user of goods distributed by means involving antitrust violations has standing to attempt proof of damages and is not precluded by "remoteness" even where the goods have passed through intermediaries and been altered).

The standing of persons whose business relationship to defendants is solely that of ordinary consumer must be evaluated in the same manner. Where the injury is so remotely connected to the alleged conspiracy that damages can only be speculative, the consumer lacks standing. *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) (monopolization of telephone equipment market aimed at "manufacturers, sellers, and lessors" of equipment rather than subscribers); *Lefrak v. Arabian American Oil Co.*, 405 F. Supp. 597

(E.D. N.Y. 1975) (consumer is within target area of foreign suppliers' conspiracy to fix prices of home heating oil).

Plantiff here is a purchaser of an item that is sold in the form in which it is manufactured; it does not become part of something else before the consumer obtains it, so that the market effects of anticompetitive practices are readily ascertainable as to each hearing aid sold. *State of Illinois v. Ampress Brick, supra.* The presence of retailers in the distribution chain does not shield defendants from suit based on defendants' actions. *Lefrak, supra*; *In re Master Key Antitrust Litigation,* 528 F.2d 5 at 12 (2d Cir. 1975). If defendants did indeed conspire to limit competition between themselves, the consumers for whose use hearing aids are manufactured are clearly "targets" of the conspiracy.

B. *"Business or Property."*

Defendants also argue that consumers cannot have standing to sue under the antitrust laws because the injury to "business or property" which gives rise to a right of action under Clayton Act § 4 must be to plaintiff's business interests. The Court cannot agree with that conclusion.

Most of the cases dealing with consumer standing under § 4 involve businessman "consumers"—persons who can and do allege injury to their commercial interests by virtue of defendants' actions. For this reason, much of the judicial language cited by defendants is inapplicable in this context. *See, e.g., Calderone, supra,* (requirement of competitive injury applied to eliminate plaintiff-businessman whose injury was too remote); *GAF Corp. v. Circle Floor Co., Inc.,* 463 F.2d 752 (2d Cir. 1972); *cert. dism.* 413 U.S. 901 (1973) (requirement of competitive injury applied to eliminate plaintiff corporation fighting attempted takeover).

Defendants base much of their argument on the holding in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir.), *cert. den.* 414 US. 1045 (1973), which dismissed governmental plaintiffs who alleged that they had had to pay higher prices for cars because of defendants' antitrust violations.[2] In deciding that case the panel relied, as do defendants here, on *Hawaii v. Standard Oil of California,* 405 U.S. 251 (1972), in which the Supreme Court held that the State of Hawaii lacked standing to sue as *parens patriae* alleging damage to its economy caused by defendants' anticompetitive actions. Reliance on one phrase from that case, however, is misplaced. Although the Court did, as defendants claim, conclude that the words "business or property" "refer to commercial interests or enterprises," 405 U.S. 251 at 264, its interpretation of "commercial interests" clearly encompasses the interest of consumers who must pay more in the marketplace because of defendants' actions. 405 U.S. 251 at 262 fn. 14. The Court distinguished the State's interest in its general economic welfare from its proprietary interest as a consumer, and it suggested that under 15 U.S.C. § 15 (Clayton Act § 4) a state could in its proprietary capacity bring a class action as representative of its consumer citizens. 405 U.S. 251 at 266. In affirming dismissal of the *parens patriae* plaintiff, the Court contradicted the claim of defendants herein that plaintiffs must be in business to have standing under § 4.[3]

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[2] *See also State of California v. Frito-Lay, Inc.,* 474 F.2d 774 (9th Cir. 1973), *cert. den.* 412 U.S. 908 (1973), in which the state's standing to sue as *parens patriae* on behalf of its consumer citizens was rejected. The Court accepted the claim of injury to the "business or property" of citizens but held that representation of these claimants was beyond the scope of the *parens patriae* doctrine.

[3] *See also Jeffrey v. Southwestern Bell, supra,* at 1130, fn.2, in which the Fifth Circuit, while refusing to decide the issue, acknowledged that the Supreme Court apparently had recognized the right of ordinary consumers to sue under § 4.

The Eighth Circuit decision in *Ragar v. T. J. Raney & Sons*, 521 F.2d 795 (1975), affirming the decision of Judge Henley in the Eastern District of Arkansas, 388 F. Supp. 1184 (1975), does not dispose of the issue. In that case, taxpayers sued investment bankers who allegedly conspired to fix the rate of interest to be paid on municipal bonds at a level higher than that which the city would have had to pay had the bidding not been "fixed." The district court, relying particularly on an Eighth Circuit decision that private citizens lack standing to sue on behalf of a municipality, stated that plaintiffs as property taxpayers neither suffered direct injury nor were within the "target area" of the conspiracy. *Ragar, supra*, at 1187. It went on to declare that plaintiffs did not assert, as they must, an injury to their business or competitive position. The Eighth Circuit affirmed "on the basis of the district court's soundly reasoned opinion." 521 F.2d 795 at 796.

In finding that plaintiffs could not allege injury to the required type of property interest, the district court relied on cases that preceded the Supreme Court's suggestion of consumer standing in *Hawaii v. Standard Oil, supra*. All were cases in which the plaintiffs were persons in business, and the existence or nonexistence of "competitive" injury was invoked only as a means of evaluating causality and remoteness of injury; none involved individual plaintiffs who were "injured in their property . . . by being led to pay more than the worth" of purchased goods. *Chattanooga Foundry v. Atlanta*, 203 US. 390 at 396 (1906). The *per curiam* affirmance in *Ragar, supra*, indicates only that the Circuit Court approved of at least one ground upon which the district court based its holding; it does not clearly indicate specific adoption of the position that a consumer cannot allege injury to "property" within the meaning of Clayton Act § 4.

As suggested by Justice Holmes in *Chattanooga Foundry, supra*, at 397, injury to "property" must mean "the money of the plaintiff." If the phrase "business or property" were interpreted to refer only to persons engaged in commercial activity, the term "property" would be rendered meaningless, for "business" and "commerce" are for all practical purposes and by common understanding identical. This Court cannot conclude that Congress included a meaningless term in this carefully considered legislation.

Defendants claim that the extensive legislative history of the Clayton Act supports their position. However, even Judge Williams, who recently decided that ordinary consumers lack standing under § 4, conceded that the statements made in congressional debate in 1890 and 1914 do not shed a great deal of light on the question. *Weinberg v. Federated Dept. Stores*, C-76-867 SW (N.D. Cal. Jan. 11, 1977), slip op. at 5. This Court acknowledges that discussion at the time primarily concerned the remedies that would be available to small businessmen rather than to retail consumers. *See*, for instance, 21 Cong. Rec. 3147 (1890) (Sen. George); 51 Cong. Rec. 9198 (1914) (Rep. Taggart). However, as recently as January 25, 1977, Justice Marshall suggested that Congress intended to include consumers among the persons entitled to sue under § 4. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 45 U.S.L.W. 4140 fn. 10 (Jan. 25, 1977).

Regardless of the conclusions one draws from a literal reading of the legislative history, the debates must be read in light of the knowledge and assumptions held by society in that period. *McBoyle v. United States*, 283 U.S. 25 at 26 (1930). In 1914, when the Clayton Act was passed to incorporate and extend the Sherman Act, "consumers" were not identifiable

as a constituency, and protection of their economic interests was an unknown concept. If they were not discussed at any great length during congressional consideration of the antitrust statutes, it is at least as probable that they did not exist in the minds of Congressmen as that they were deliberately ignored.

In his opinions dealing with this issue Judge Williams concludes that the recent amendments to the antitrust laws indicate a current congressional understanding that consumers lack standing to sue under § 4 and must be protected by a grant of standing to the states to sue as *parens patriae*. *See Weinberg v. Federated Dept. Stores, supra*, slip op. at 10; Antitrust Improvements Act, P.L. 94-435 (Sept. 30, 1976). The legislative history of these amendments, however, indicates the contrary: Congress felt that consumers were precluded from suing as a matter of practicality rather than of law.[4] The House report on H.R. 8532, which became P.L. 94-435, stated:

> "Under § 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action. In most instances, however, an individual lawsuit by an injured consumer is, as a practical matter, out of the question." H. Rpt. 94-499, Sept. 22/Nov. 4, 1976, USCCAN 94th Cong. 2d Sess. (1976), p. 4057.

[4] To illustrate the difficulty in declaring unequivocally that Congress did or did not in 1890 or 1914 intend that individual consumers have standing, we note that during those extensive discussions of the plight of the small businessman, Sen. George remarked that a "consumer" overcharged by $25.00 on a commodity would have little incentive to sue because of the cost of litigation. 21 Cong. Rec. 1768 (1890). What he meant by "consumer" is a matter for sheer speculation.

The report cites the difficulty, expense, and unmanageability of massive class action litigation and concludes that the *parens patriae* method will serve the public interest in antitrust cases involving large numbers of injured consumers. At no time does it suggest that the legal remedy is a novel one, only that the method of pursuing it is new,

In congressional debate on this bill, Rep. Seiberling, who practiced antitrust law for seventeen years before election to Congress, indicated a similar understanding of consumer standing. "All this bill will do," he stated,

> "is provide a means to make more effective an existing procedural remedy which every consumer already has in theory, but which small consumers are in practice unable to exercise." 122 Cong. Rec.-House 2065 (daily ed., Mar. 18, 1976).

This Court will not now declare that antitrust remedies are not available to individual consumers "in theory."

The Court does agree with Congress that the remedy sought here may well be unavailable in fact. In passing on the standing question, the one raised on this motion, the Court expresses no opinion on the merits of the claims or the certifiability of a class.

IT IS ORDERED:

That defendants' motions be, and hereby are, denied.

/s/ EARL R. LARSON
United States District Judge

March 31, 1977.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1474

KATHLEEN R. REITER, Individually and as Representative of the Class of All Personal Users of Hearing Aids Located in the U.S.,

Appellee,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minn. corporation; TEXTRON, INC., a Delaware corporation; and RADIOEAR CORPORATION, a Delaware corporation,

Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA.

Submitted: October 14, 1977
Filed: June 19, 1978

Before BRIGHT, WEBSTER,* and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

Plaintiff-appellee, Kathleen R. Reiter, commenced this class action for treble damages on May 2, 1975, against defendants-

* The Honorable William H. Webster participated in oral argument but took no part in the disposition of this appeal.

appellants, hearing aid manufacturers, under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). In her complaint, she alleged that these manufacturers by combining and conspiring to violate the antitrust laws had controlled their dealers' sales practices, particularly the price at which hearing aids ultimately would be sold to consumers.[1] Reiter brought the action for relief under the antitrust laws on behalf of herself and "all persons in the United States or any sub part thereof who directly or indirectly purchased * * * hearing aids [at the allegedly unlawful prices]."

The manufacturers moved for dismissal or, alternatively, for summary judgment arguing, *inter alia*, that as noncommercial consumers Kathleen Reiter and the class she sought to represent had not been injured in their "business or property" under section 4 of the Clayton Act. The district court, in a comprehensive memorandum opinion,[2] denied the manufacturers' motions but certified the issue of consumer standing as appropriate for interlocutory review under 28 U.SC. §1292 (b) (1970); we authorized the interlocutory appeal.

In this appeal, we are presented the narrow question whether a consumer who purchases a hearing aid for personal use at a higher price because of a manufacturer's allegedly anticompetitive activity suffers injury to business or property under section 4 of the Clayton Act. Section 4 provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United

[1] The complaint sought both monetary and injunctive relief.
[2] The district court opinion is reported at [1977] 1 Trade Cas. (CCH) ¶61, 360 (D. Minn. Mar. 31, 1977).

> States * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C. § 15 (1976).]

We hold that such consumers are not injured in their "business or property" for purposes of section 4 and reverse the district court.[3]

I. *Legislative History.*

Section 4 of the Clayton Act was first codified in section 2 of the Sherman Act. The Sherman Act, promulgated in 1890, was a congressional reaction to the concentrations of economic power that emerged from the industrialism of the mid-nineteenth century. *See* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L.Rev. 570, 570 (1964). Declaring monopolies and restraints of trade illegal, congress sought "to free competition in business and commercial transactions * * *." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1939). The history of the Sherman Act, as evidenced in the legislative proceedings,[4] emphatically supports the conclusion that the Act was designed to prevent re-

[3] Appellees did not purchase their hearing aids directly from the manufacturers. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that only direct purchasers may sue for treble damages under § 4 of the Clayton Act. The Court recognized, however, that indirect purchasers may maintain actions involving cost-plus contracts as well as those "in which market forces have been superseded [as when] the direct purchaser is owned or controlled by its customer." *Id.* at 736 & n.16.

Appellees contend that the manufacturers in this case engaged in various prohibited vertical restraints including resale price maintenance. In view of our holding that ordinary consumers may not maintain treble damage actions, we need not decide whether appellants' alleged violations constitute an exception to *Illinois Brick*.

[4] For an exhaustive analysis of the Sherman Act's legislative history, see M. Forkosch, *Antitrust and the Consumer (Enforcement)* 32-170 (1956).

straints of trade significantly affecting business competition. *Id.* at 493 n.15.[5]

The legislative history underlying the provision permitting private damage actions, while voluminous and in parts illuminating, is less explicit. Courts and commentators have been unable to agree on the precise congressional intent.

As originally introduced by Senator Sherman in the Senate Finance Committee, the bill in section 2 broadly authorized damage actions by "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination * * *." S.1, 51st Cong., 1st Sess. § 2(1889). This original language was, however, completely revised by the Senate Judiciary Committee. The amended language, which became section, 7, limited treble damages to any

[5] An early resolution introduced on July 10, 1888, by Senator Sherman and passed without discussion directed the Senate Finance Committee to study the efficacy of curtailing "trusts or combinations * * * made with a view * * * to prevent *free and full competition* * * * with such penalties and provisions * * * as will tend to preserve freedom of trade and production [and] the natural competition of increasing production * * *." 19 Cong. Rec. 6041 (1888) (remarks of Sen. Sherman) (emphasis supplied). This resolution, which gave rise to the congressional debates and ultimately the Sherman Act, explicitly articulated the economic philosophy of the bill's proponents. The bills introduced between 1888 and 1890 are consistent with this approach. *See, e.g.*, S.3445, S.3510, and H.R. Rep. 11339, 50th Cong., 1st Sess. (1888) (arrangements that tend to prevent full and free competition in the production, manufacture, or sale of articles are void), *cited in Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493-94 n.15 (1939). The debates accompanying the final bill also stressed the importance of preserving competition and the need to proscribe those agreements, combinations, and trusts whose purpose was to destroy competition. *See generally* 21 Cong. Rec. 2457-2461 (1890) (remarks of Sen. Sherman); *id.* at 2558 (remarks of Sen. Pugh); *id.* at 2729 (remarks of Sen. Platt); *id.* at 3147 (remarks of Sen. George); *id.* at 4089 (remarks of Rep. Culberson).

The Supreme Court has noted this virtual unanimity of Congress in seeking to protect and preserve a free competitive environment. *See Apex Hosiery Co. v. Leader, supra*, 310 U.S. at 493-95 n.15.

person injured in his business or property by an antitrust violation. 21 Cong. Rec. 2901 (1890).

Congress failed to indicate explicity the rationale for limiting the injuries for which treble damage actions could be maintained. Senator Morgan, however, recognized the need to limit the breadth and scope of private actions.

> This bill ought not to be a breeder of lawsuits. If there is any one duty we have got higher than another in respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation as far as we can. [21 Cong. Rec. 3149 (1890) (remarks of Sen. Morgan).]

The Supreme Court has noted that the legislative history is not very instructive in explaining the purpose for limiting recovery to business or property injuries. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972). *See also* Comment, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 Colum. L.Rev. 394, 396 n.15 (1972).

Despite its somewhat inconclusive explanation, however, we cannot ignore Congress' explicit rejection of the original Sherman bill's broad language in favor of the statute as enacted. While ordinary consumers arguably would have been included in if not encouraged by the bill as originally introduced, we think the statute as enacted was intended to limit the class of persons able to bring a private damage action. *See* 21 Cong. Rec. 3149 (1890) (remarks of Sen. Morgan).

Some members of Congress argued that the enacted provision containing the limiting language would be of little use to the average consumer. In fact, Senator George, recognizing that consumers would be virtually remediless with the statute as written, urged without success more effective remedies for consumers.

> [T]he poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant, all that large class of American citizens who constitute 90 per cent of our population and who are the real sufferers will have no opportunity of redress, and the bill, so far as they are concerned, will be a snare and a mere delusion. [21 Cong. Rec. 3150 (1890) (remarks of Sen. George).][6]

See id. at 3147-48, 1767-68; *id.* at 2571 (remarks of Rep. Hiscock); *id.* at 2564 (remarks of Sen. Reagan). We note this congressional concern with the statute's inability to aid the consumer. We cannot, however, amend the Act to include that which Congress neglected or intentionally excluded. *Cf. Pfizer, Inc. v. Government of India*, 98 S.Ct. 584, 587 (1978) (resolution of section 4's meaning "turns on the interpretation of the statute").

In 1914, Congress enacted the Clayton Act. Section 7 of the Sherman Act became section 4 of the new statute and retained the "business or property" limitation. The Senate Report accompanying the Clayton Act indicates that Congress, by its enactment, did not intend to amend the Sherman Act. The report comments:

> This section, which gives any person injured by a violation of the antitrust acts the right to sue in the Federal courts for threefold the damages by him sustained * * * is not proposed to be amended in any particular. [S. Rep. No. 698, 63rd Cong., 2d Sess. 45 (1914).]

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[6] Senator George's remarks reflect the practical rather than theoretical obstacles to consumer actions because the mechanic or country merchant alleging a business or commercial injury would be able to sue for treble damages even if consumers failing to allege such injury could not.

Congress' principal concern in enacting the Clayton Act, as articulated in its comments accompanying the statute, was to provide a remedy to persons suffering a business injury as a result of combinations operating in restraint of trade. *See* 51 Cong. Rec. 9270 (1914) (remarks of Rep. Carlin). During the House debates, Representative Webb, a member of the Judiciary Committee, who explained the various statutory provisions, described section 4 (then section 5) as providing a treble damage cause of action to "any person * * * injured in his *business*, by reason of anything forbidden in the antitrust laws * * *." 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb) (emphasis supplied). *See also* 51 Cong. Rec. 16,274 (1914) (remarks by Rep. Webb) (section 4 authorizes suits by a *business* man).

Representative Taggart, a member of the House Finance Committee, emphasized the commercial nature of the injury for which Congress intended to provide relief.

> A great many suits have been brought against trusts [that] have been dissolved. Some few have been punished, put the people whose business they destroyed have been practically without a remedy. When this bill becomes a law, the person who willfully destroys another person's business will do so at his peril.
>
> The bill is framed for the purpose of liberating *business* and not for the purpose of injuring or destroying any *business. Its great purpose is to protect small business from big business*, and to compel all business to be conducted honestly. [51 Cong. Reg. 9198 (1914) (remarks of Rep. Taggart) (emphasis supplied).]

Senator Reed similarly identified business as the primary interest protected by the statute.

> It follows that the Argus eyes of thousands of business men now being injured will be upon the powerful concerns, and the thousand arms of the courts will be employed to prevent their evil practices. [51 Cong. Rec. 12,939 (1914) (remarks of Sen. Reed).]

Moreover, in section 16 the Clayton Act permits injunctive relief to "[a]ny person * * * threatened [with] loss or damage by a violation of the antitrust laws * * *." 15 U.S.C. § 26 (1976). This rather broad provision does not contain section 4's business or property limitation.[7] We think Congress, in considering this carefully drafted statute, contemplated the modes of relief that, consistent with the Act's purposes, would most effectively protect the various interests in the economy.

In sum, the legislative history indicates a congressional awareness that the antitrust laws would benefit the small business owner but would be of little value to the ordinary consumer.[8]

II. *Judicial Decisions—"Business or Property."*

The meaning and scope of "business or property" in section 4 have generally been discussed by the courts in contexts other

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[7] The Supreme Court has recognized that these two sections are "notably different." *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-61 (1972) (comparing "business or property" requirement of § 4 with "threatened loss or damage" requirement of § 16); *cf. Calnetics Corp. v. Volkswagon of America, Inc.*, 348 F. Supp. 606 (C.D. Cal. 1972), *modified*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) (plaintiff entitled to injunctive relief despite failure to prove causal connection necessary to support claim for damages).

[8] In contrast, the Supreme Court acknowledged in *Pfizer, Inc. v. Government of India*, 98 S.Ct. 584 (1978): "It seems apparent * * * the question [whether foreign nations are entitled to sue for treble damages under § 4 of the Clayton Act] was never considered at the time the Sherman and Clayton Acts were enacted." *Id.* at 587.

than consumer standing.[9] There has been some recognition that an injury to property is different and, perhaps, broader than a business injury.[10] *See generally* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570, 577-78 (1964).

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[9] Independent of the consumer standing issue, the United States appellate courts have narrowed the class of persons able to seek treble damages for antitrust violations by employing a causation analysis similar to the proximate cause limitation contained in tort law. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting). The right to recover in the Ninth, Fifth, Fourth, and Second Circuits is limited to those in the "target area" of the alleged violative activity. *See, e.g., Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793, 800-01 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (U.S. Nov. 1, 1977); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 128-29 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966). The Third Circuit has narrowed standing to those plaintiffs suffering a "direct injury". *See Bravman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90, 96-97 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3215 (U.S. Oct. 4, 1977). The Sixth Circuit has examined whether the plaintiff was in the "protected zone of interest." *See Malamud v, Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975), *citing Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). This circuit has required an "injury * * * something more than remote * * *." *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 689 (8th Cir. 1966).

[10] In *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D. N.Y. 1964), the court noted the distinction between business and property. The plaintiff in that case had entered into a contract that would have given him oil importation rights. He was alleging that an illegal conspiracy prevented his importation of the oil. Because his enterprise was only potential, the court found that no "business" within the meaning of the Act existed. The court went on to decide, however, that the statute uses the two terms in the disjunctive; § 4 as it is written is broader than just business. "The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.' " *Id.* at 86. Under this conception, property is any legally protected interest. *Id.*

This distinction was also noted in *Hamman v. United States*, 267 F. Supp. 420 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968), cited with approval in *Hawaii v. Standard Oil Co., supra*, 405 U.S. at 264. There, damages were sought for the death of a workman who had been killed during the construction of a dam. In one count, plaintiff alleged that: (1) an illegal conspiracy in restraint of trade had prevented other, more careful construction companies from bidding on the job; (2) defendant's failure to exercise reasonable care had caused decedent's death; thus, (3) plaintiff who had suffered loss of consortium, a recognized property interest under state law, had been injured in her property under § 4 of the Clayton Act. The court, citing *Waldron, supra*, stated that "property" in § 4, is broader than business, but that an injury to business or property requires "a commercial venture or enterprise." 267 F. Supp. at 432. The court dismissed the count on the ground that, while plaintiff had suffered an injury to property under state law, she had not suffered an injury to the types of property "protected * * * by the antitrust laws." *Id.* The court also stressed the absence of proximate cause between the injury and the alleged wrongful conduct. *See* n.9 *supra*.

In *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396, 399 (1906), the Court, through Mr. Justice Holmes, discussed "business or property".

> The facts gave rise to a cause of action under the Act of Congress. * * * [The City] was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property.
> * * * *
> A man is injured in his property when his property is diminished.

On its face, the Court's language suggests that consumers forced to pay more for a product by virtue of anticompetitive activity suffer injury to their property. The City of Atlanta, however, had commenced the action against two companies that allegedly had combined to keep the price of iron water pipe artificially high. As a result, the cost to the city of supplying water to its residents was increased. Thus, the city's claim arguably sought recovery for a business injury.

Neither the Supreme Court nor a federal appellate court has specifically addressed whether ordinary consumers who purchase a product for personal use at a higher price because of anticompetitive activity suffer an injury to property under section 4 of the Clayton Act.[11] The Supreme Court has intimated that such injury, in order to be legally cognizable, must be of a commercial nature.

> Like the lower courts that have considered the meaning of the words "business or property," we conclude that they refer to commercial interests or enterprises. [*Hawaii v. Standard Oil Co., supra,* 405 U.S. at 264 (1972).]

In *Hawaii,* the state had brought a *parens patriae* action on behalf of its citizens as the representative of a class of all purchasers in the state. The Court denied standing to the state to sue for injuries to the general economy.

> When the State seeks damages for injuries to its *commercial interests,* it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act. [*Id.* (emphasis supplied).][12]

This circuit has approved language suggesting that, in order to be recoverable, the injury to "business or property" must be a competitive one. *See Ragar v. T. J. Raney & Sons,*

[11] A trilogy of cases recently decided by Judge Williams in the Northern District of California has been consolidated and is currently before the Ninth Circuit. In all three cases, Judge Williams held that consumers purchasing products for personal use suffer no injury to business or property under § 4 and may not bring treble damage actions for relief. *See Weinberg v. Federated Department Stores,* 426 F. Supp. 880 (N.D. Cal. 1977); *Gutierrez v. E. & J. Gallo Winery Co.,* 425 F. Supp. 1221 (N.D. Cal. 1977); *Smith v. Toyota Motor Sales U.S.A., Inc,* No. 75-0727 (N.D. Cal. Jan. 11, 1977), *appeals docketed,* Nos. 77-1845, 77-1724, 77-1725, 77-1850, 77-1851, 77-1852 (9th Cir. 1977). Judge Williams analyzed the legislative history of the statute, relying upon the change in the section's language, the fear of a proliferation of lawsuits, and statements in the congressional debates extolling the benefits of the Act to businessmen. He also examined language in several court decisions, including *Hawaii v. Standard Oil Co., supra,* and *Ragar v. T. J. Raney & Sons,* 388 F. Supp. 1184 (E.D. Ark.), *aff'd,* 521 F.2d 795 (8th Cir. 1975) (*per curiam*), *see* p. 13 *infra,* and concluded that the phrase "business or property" cannot be read in the disjunctive but "is a conjunctive reference to interests of a business nature." *Gutierrez v. E. & J. Gallo Winery Co., supra,* 425 F. Supp. at 1225. Therefore, consumers who alleged no injury to a business enterprise were held to be without standing to sue.

[12] The Court did not, however, define commercial interest and, in a footnote, distinguished an injury suffered by the state in its capacity as a "consumer in the marketplace," which is within the scope of § 4's protection, from that occurring merely to the state's general economy, which is not. *Hawaii v. Standard Oil Co., supra,* 405 U.S. at 262-63 n.14. Similarly, in explaining a provision enabling the United States to sue for antitrust violations that is also limited to injuries to business or property, the Court stated the provision was not intended to cover general injuries to the national economy, "but only * * * those * * * suffered * * * as a consumer of goods and services." *Id.* at 265. The Court also noted that a large part of any injury to the state's general economy "is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4." *Id.* at 264.

In addition to this language by the Court in *Hawaii,* appellee cites, and we note, several judicial references, some by the Supreme Court, suggesting that "consumers in the marketplace" should be permitted redress for injuries suffered through anticompetitive actvity. *See, e.g., Pfizer, Inc. v. Government of India,* 98 S.Ct. 584, 592, 594 (Burger, C.J., dissenting) (1978); *Brunswick v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486 n.10 (1977). In *Cleary v. Chalk,* 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 938 (1974), the court, acknowledging that the phrase "business or property" refers to commercial interests or enterprises, stated: "We have no doubt that a consumer of service who is illegally overcharged sustains a property injury no less than a consumer of goods." Relying upon *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390, 396 (1906), the court indicated that a consumer of goods is injured in his property by violations of the antitrust laws that raise the price of goods. In *Bravman v. Bassett Furniture Industries, Inc., supra,* a suit by a sales representative of a furniture manufacturer, the court stated: "The right of consumers to challenge price fixing conspiracies is well established." 552 F.2d at 99 n.23.

These references, however, are not inconsistent with our construction of § 4. Consumers who suffer commercial injury to business or property may sue for treble damages. Moreover, the consumer standing question presented in this appeal was not addressed by these courts. *See* n.18 *infra.*

388 F. Supp. 1184, 1187 (E.D. Ark.), *aff'd*, 521 F.2d 795 (8th Cir. 1975) *(per curiam)*. *Ragar* involved an antitrust action by property owners against investment banking firms who had conspired to keep interest rates on municipal bonds higher than they otherwise would have been. The district court, finding that plaintiff's injury was remotely related to the alleged violation, held that plaintiffs lacked standing to sue. Alternatively, the court said the plaintiffs had not been injured in their "business or property" because that phrase requires a competitive injury.

> Since the purpose of the antitrust laws is the "prevention of restraints to free competition in business and commercial transactions," * * * it follows that only those persons injured in their competitive positions in a business in which they are engaged should be permitted standing to sue under the Clayton Act. [368 F. Supp. at 1187.]

Other circuits have similarly suggested that section 4 requires a competitive or commercial injury. In *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973), one company alleged that another company was attempting a takeover in order to monopolize the industry. The court, concluding that the policy favored by the Act is competition, sustained the district court's dismissal of the complaint for failure to state a claim.

> The Supreme Court has consistently reiterated that "[t]he Sherman Act was * * * aimed at preserving free and unfettered *competition* as the rule of trade," and that "the policy unequivocally laid down by the Act is competition." * * * The courts, in interpreting § 4 of the Clayton Act and its predecessor, have endeavored, although with some inconsistency and conflict, to promote the policy of competition established by the Sherman and Clayton Acts by interpreting § 4 as allowing treble damages only to those who have suffered some diminution of their ability to compete. Whether viewed in terms of "lack of standing" or the absence of *antitrust* damages, the courts, in denying recovery to various kinds of plaintiffs, have sought to confine recovery to those who have been injured by restraints on competitive forces in the economy.
>
> Not all persons who may be able to trace an economic loss to a violation of the antitrust laws can recover under those laws. The Supreme Court has stated that, in determining who may sue under § 4, the central question is one of *competitive injury*. [*Id.* at 757-58 (emphasis in original).][13]

In *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), the Ninth Circuit, citing *Hawaii v. Standard Oil Co., supra*, also expressed the view that the phrase "business or property" limits standing to those engaged in commercial ventures and enterprises. 481 F.2d at 131. *See also Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1175 (5th Cir. 1976) (in

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[13] *But see Pfizer, Inc. v. Government of India, supra*, 98 S.Ct. at 588, *citing Illinois Brick Co. v. Illinois, supra*. In *Pfizer*, the Court noted that "§ 4 has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.'"

This reference by the Court to the compensatory rationale of § 4 was designed merely to emphasize its remedial function. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. at 485. The Court has repeatedly stressed as the general purpose of the antitrust laws the need to enhance competition. *See Hawaii v. Standard Oil Co., supra*, 405 U.S. at 262; *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *Apex Hosiery Co. v. Leader, supra*, 310 U.S. at 493.

order to be cognizable under section 4, the injury must be to commercial interests or enterprises) *cf. Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 730 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (in order to satisfy section 4's business or property prerequisite, fired worker must demonstrate that "his job [was] a commercial venture or enterprise").

Our review of the cases convinces us that the few courts specifically addressing the question have recognized that section 4 requires a commercial or competitive injury.

III. *Antitrust Improvements Act of 1976.*

In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act. The new statute permits "State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws." H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2572. Congress intended in the new Act "to provide a remedy for injured consumers." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 756-57 (1977) (Brennan, J., dissenting). This Act represents a congressional response to the holding of *Hawaii v. Standard Oil Co., supra* (Clayton Act does not authorize a state to sue on behalf of its citizens for injury to its general economy). *See Illinois Brick Co. v. Illinois, supra*, 431 U.S. at 756 (Brennan, J., dissenting).

According to the Act's legislative history, some members of Congress assumed, contrary to our construction of the statute, that ordinary consumers may currently sue for treble damages under section 4.[14] As the Supreme Court has noted,

[14] *See, e.g.*, 122 Cong. Rec. 2065 (daily ed. Mar. 18, 1976) (remarks of Rep. Seiberling). *See generally* H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 3-9, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2572-78.

however, Congress made clear that the new legislation did not alter the definition of injured persons under section 4, *see Illinois Brick Co. v. Illinois, supra*, 431 U.S. 720 at 733-34 n.14, and the House Judiciary Committee acknowledged that the bill did not create new substantive liability. H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 9, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2578. "The views expressed by particular legislators * * * cannot * * * change the legislative intent [of section 4] * * * 'since the statements were [made] after passage of the [Clayton] Act.'" *Illinois Brick Co. v. Illinois, supra*, 431 U.S. at 733-34 n.14.

In the House Report accompanying the bill, the Judiciary Committee noted:

> The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. * * *
>
> Frequently, antitrust violations injure thousands or even millions of consumers, each in relatively small amounts. * * *
>
> Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws. Nonetheless, Federal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers. * * * [This bill] fills this gap by providing the consumer an advocate in the enforcement process—his State attorney general. [H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2573-74.]

The Senate Judiciary Committee also noted that, in light of previously recognized judicial limitations, consumers had not been permitted to maintain antitrust actions.

> [The new act] is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to [class action] manageability * * * *Standing, privity, target area, remoteness, and the like.* [*Illinois Brick Co. v. Illinois, supra,* 431 U.S. at 757, *citing* S. Rep. No. 94-803, 94th Cong., 2d Sess. 42 (1976) (emphasis in original).]

We think it significant that Congress, which sought to provide a meaningful remedy for consumers in the 1976 Act, did not seek to improve, clarify, or alter any existing private right of action for ordinary consumers. Congress did comment on the inappropriateness of the class action as a means of redressing consumers who pay higher prices because of anticompetitive activity. See H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2576-77.

The goals and purposes of the antitrust laws may not be enhanced by permitting gigantic consumer class actions, many of which are never tried. In Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach,* 85 Yale L.J. 626, 627-30 (1976), the authors point out the failure to date, of the class action vehicle to compensate aggrieved consumers. Judge Medina, of the Second Circuit, has noted: "not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits." *Eisen v. Carlisle & Jaquelin,* 479 F.2d 1005, 1018-19 (2d Cir. 1973), *aff'd,* 417 U.S. 156 (1974).[15]

[15] In our own circuit we have had an opportunity to review a grand scale antitrust class action in various contexts. *See United States v. Pfizer, Inc.,* 560 F.2d 323 (8th Cir. 1977); *United States v. Pfizer, Inc.,* 560 F.2d 319 (8th Cir. 1977); *Republic of Vietnam v. Pfizer, Inc.,* 556 F.2d 892 (8th Cir. 1977); *Pfizer, Inc. v. Government of India,* 550 F.2d 396 (8th Cir.), *aff'd en banc,* 550 F.2d 400 (1976), *aff'd,* 98 S.Ct. 584 (1978); *United States v. Lord,* 542 F.2d 719 (8th Cir. 1976); *Pfizer, Inc. v. International Rectifier Corp.,* 538 F.2d 180 (8th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977); *Pfizer, Inc. v. International Rectifier Corp.,* Nos. 75-1089 & 75-1187 (8th Cir. Mar. 26, 1975); *Pfizer, Inc. v. Lord,* 522 F.2d 612 (8th Cir. 1975), *cert. denied,* 424 U.S. 950 (1976); *In re Fish & Neave,* 519 F.2d 116 (8th Cir. 1975); *Pfizer, Inc. v. International Rectifier Corp.,* No. 74-1425 (8th Cir. July 26, 1974); *Pfizer Inc. v. Lord,* 456 F.2d 545 (8th Cir. 1972); *Pfizer Inc. v. Lord,* 456 F.2d 532 (8th Cir.), *cert. denied,* 406 U.S. 976 (1972). It is our understanding that the merits in that case have never fully litigated.

Often, defendants who are unwilling or unable to defend such suits are compelled for economic reasons to settle actions otherwise meritless. The result of such settlements will inevitably be counterproductive when the costs to the defendant of defense and settlement are passed on to present and future consumers. Moreover, big firms are better able than small or medium-sized businesses to defend or settle such claims under similar circumstances. The ultimate result might be to preserve an oligopolistic economic climate. The deterrent impact of such suits, in our view, does not outweigh their potentially ruinous effect on American business. Deterrence exists in other antitrust remedies[16] as well as in the 1976 Act, which places responsibility for consumer actions upon state attorneys general. We agree with Congress that the new statute will effectively protect the interests of consumers without imposing upon the courts and the economy the risk and burden of nonmeritorious class actions.[17]

[16] In addition to the new statute, the Justice Department's antitrust division as well as the Federal Trade Commission are empowered to combat anticompetittive activity.

[17] We, of course, intimate no view on the merits of the present action.

IV. *Conclusion.*

In sum the broad purposes of the Sherman and Clayton Acts were to provide an appropriate and *effective* remedy and to assure and protect competitive enterprise. The statutes primarily emphasized enforcement by businesses particularly small businesses against predators. We cannot ignore Congress' rejection of the broad language in the original Sherman Act in favor of the "business or property" limitation of the statute as enacted. We are also mindful of the congressional concern that consumers would be virtually without a remedy. We believe in light of the statutory history that Congress did not legislate in a vacuum. While the Act neither defines nor explains business or property we think the overall purpose of the antitrust laws to enhance competition *see Hawaii v. Standard Oil Co., supra,* 405 U.S. at 262; *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962); *Apex Hosiery Co. v. Leaders, supra,* 310 U.S. at 493 will best be served by requiring a commercial injury before a person may invoke the treble damage provisions of section 4.[18]

For the foregoing reasons we think it sensible as a matter of policy and compelled as a matter of law that consumers alleging no injury of a commercial or competitive nature are

[18] Appellees argue that numerous consumer actions have been permitted by the courts, many to completion, without any discussion of consumer standing. For example, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), purchasers of homes successfully attacked attorneys' use of minimum fee schedules. The Supreme Court, while noting that this type of activity harmed consumers, *id.* at 782, did not specifically discuss consumer standing. *See also Fisher v. First National Bank of Omaha,* 548 F.2d 255 (8th Cir. 1977) (failing to address consumer standing, court dismissed action on other grounds).

In these cases, however, the issue was neither raised by the parties nor addressed by the courts; as such, it cannot be deemed to have been decided.

not injured in their property under section 4 of the Clayton Act.[19]

Reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Caption)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

Filed: August 11, 1978

ORDER DENYING PETITION FOR REHEARING EN BANC

The petition for rehearing en banc in the above case is denied by four of the judges voting in favor of the denial. Three of the judges vote in favor of the rehearing en banc.

Lay, Circuit Judge, joined by Heaney and Stephenson, would grant the petition for rehearing en banc for the following reasons:

The panel's decision denying standing to an individual consumer under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), is contrary to the rationale of *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906) and *Pfizer Inc.*

[19] Appellee's complaint in the district court sought both monetary and injunctive relief. She is precluded by our decision from maintaining an action for treble damages under §4. Her claim for injunctive relief, however, is not before us in this interlocutory appeal.

v. Government of India, 98 S.Ct. 584 (1978). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 n.10 (1977). The decision is also contrary to several lower federal court decisions. *See Cleary v. Chalk*, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E.D. N.Y. 1978); *DeGregorio v. Segal*, 443 F. Supp. 1257, 1260-61 (E.D. Pa. 1978); *In re Petroleum Products Antitrust Litigation*, 1977-2 Trade Cases (CCH) ¶61,639 (C.D., Cal. Sept. 16, 1977); *In re Ampicillin Antitrust Litigation*, 1977-1 Trade Cases (CCH) ¶61,434 (D. D.C. May 17, 1977). *See also* L. Sullivan, Antitrust 771 n.3 (1977). The denial of standing to an individual consumer reduces to a nullity the parens patriae provisions of the Antitrust Improvements Act of 1976, 15 U.S.C.A. §§ 15c-15h (Supp. 1978), which authorize state attorneys general to bring actions on behalf of natural citizens for *non-business* injuries.[1] We also join in the government's criticism contained in its amicus curiae brief in support of plaintiff's petition for rehearing:

> The panel opinion (sl. op. 18-19) appears to have been influenced significantly by the belief that consumer class actions seeking treble damages are anti-competitive. It asserts that such suits are meritless, yet exact unfair settlements from defendants, especially small businesses, that are unable to bear the costs of a defense. It thus concludes that any pro-competitive impact of these treble damage suits are outweighed by their entrenchment of large enterprises and their potentially ruinous effect on

[1] Subsequent legislation indicating the intent of an earlier statute is entitled to great weight in statutory construction. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

> American small business. The panel's decision, however, reaches beyond its proffered concerns. It excludes all consumer treble damage actions brought under Section 4, not just class action suits. More importantly, it represents a policy judgment beyond the province of the judiciary. The courts are not free to interpret statutory language to support their views of wise economic policy. It is Congress' policy choice which must be implemented and the panel decision frustrates rather than effectuates the Congressional will.

Brief for Government at 9-10.

For the foregoing reasons and those succinctly stated by Judge Larson in his memorandum opinion below, we would grant the petition for rehearing.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.